REMARKS

ON THE

LAW REGARDING MARRIAGE

WITH

THE SISTER OF A DECEASED WIFE.

BY

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ADVERTISEMENT.

SOME years since I was consulted professionally as to the legality of a marriage with the sister of a deceased wife. In investigating the legal question, I was necessarily led to consider the legislative one; and at the request of a friend deeply interested in the subject, I wrote a short pamphlet entitled "Summary of Objections to the Doctrine that a Marriage with the Sister of a Deceased Wife is contrary to Law, Religion or Morality," which was printed for private circulation in 1839, and afterwards reprinted in the *Law Magazine*. This is mentioned to account for any similarity of thought or expression that may be observed between it and the following Remarks; in which an attempt is made to maintain the ground taken in the Summary, against fresh and formidable controversialists.

Temple, Jan. 6th, 1845.

REMARKS

&c.

THE question regarding marriage with the sister of a deceased wife, has been recently discussed with great learning and ingenuity; but the most important *fact* brought to light, is the extent of the evil resulting from the present condition of the law. Lord Wharncliffe distinctly pledged himself to prove "not that there are many hundred cases, but that there are thousands of such marriages, which have been contracted since 1835;" in other words, that there are thousands of families unnecessarily exposed to great wretchedness; and the number is notoriously on the increase. It may be as well to explain at once how this has come to pass since 1835.

Prior to an Act (5 & 6 Will. 4, c. 54) passed in that year, a marriage within the Levitical degrees was not void, but voidable: i. e. it might

have been annulled at any time by a suit instituted while both parties were living, but not afterwards. During this state of things, many persons related by affinity within the doubtful degrees, married in the full confidence that no one, as public opinion stood, would undertake the invidious task of disuniting them. The prohibition was thus virtually relaxed, and these voidable marriages acted as a kind of safety valve. Though they were frequent and notorious, the legislature did not interpose in 1835 with the view of stopping them. On the contrary, it being thought hard to keep whole families during perhaps half a century in doubt whether the tie was to be dissolved and the children bastardized, it was simply proposed to mitigate the hardship, by limiting the period within which the legitimacy of the children might be impugned. This was to be fixed at two years from the celebration in regard to future marriages, and six months in regard to marriages already solemnized. It was no part of Lord Lyndhurst's original measure to enact that all future marriages of the kind should be absolutely void, and an enactment to this effect was only suffered to pass unopposed in the House of Commons, upon an express understanding that the subject was to be fully reconsidered in all its bearings at an early period.

Such an enactment, however, did pass, and has thrown fresh difficulties in the way of these marriages, but it has failed to put a stop to them, and has made no change in the general feeling respecting them. Parties who can afford it, repair to a foreign state (Hamburgh or Denmark, for example) where the prohibition does not exist, get domiciled, and marry there. The poor, confiding in their obscurity, get married (or go through the form) in the ordinary manner in their parishes. The mischief in their case is, that, if the couple happen to disagree, they take advantage of the illegality to part. In the case of parties married abroad, there is also great risk. The opinions of the leading members of the legal profession have been taken, but none of them can venture to state positively how such marriages would be regarded by our courts; though the better opinion is that they would be held good. In the meantime, the chance of a disputed succession is hanging over each couple that has ventured on the step.

The facts are proved by the petitions. One numerously signed by the provincial clergy states—

"That, as your petitioners are informed, great numbers of persons among the higher and middling classes of society have resorted to foreign countries to cele-

brate such marriages,—thus proving that the existence of the prohibition, as applied to marriages celebrated here, has no moral effect in discountenancing the practice with parties whose circumstances enable them to evade the law.

" 6thly, That the validity of such marriages, though celebrated in a foreign country, is, in the opinion of many eminent lawyers, at least doubtful; so that each separate example is calculated to disturb the future peace of families, by raising up a doubtful offspring, and exposing them to all the miseries of litigation with their nearest relatives.

" 7thly, That, among the poorer classes, a prohibition so directly at variance with natural impulses, has a direct immoral tendency, by enabling the unprincipled to contract such marriages, and then to repudiate their wives when it suits their purpose; and your petitioners have reason to believe that these effects have already been extensively produced."

In a petition to the House of Lords, signed by seventy-six of the leading firms of London solicitors and by several hundred country solicitors, it is set forth:

" That the effect of the existing law which prohibits marriage within certain degrees of affinity, admits of serious doubts as applied to such marriages solemnized abroad; some of our most eminent civilians and lawyers being of opinion that it works a personal disqualification between the parties which nothing can remove—others considering that domicile in a foreign country, where such marriages are lawful, removes the disability—and

others, again, conceiving that the mere celebration of the marriage in such a country is sufficient.

"That your petitioners have reason to believe that numerous marriages of this kind, especially between widowers and their deceased wives' sisters, have been solemnized abroad since the passing of the act of 5th & 6th Will. 4, c. 54.

"That, in the opinion of your petitioners, such a state of the law is highly inexpedient; being calculated to create doubts as to the legitimacy of children, to promote litigation amongst the nearest relatives, and to place the titles to numerous estates upon an insecure footing."

The existence of the evil, and its extent, are therefore clearly proved; and no remedy has been or can be suggested but an Act to legalize such marriages. This, however, is opposed on two grounds: first, that they are contrary to religion; secondly, that they are contrary to sound policy.

The Levitical precepts form the basis of the religious objection, and it is assumed that these are binding on Christians, and that the degree of affinity in question is within them. It would be easy to shew by the authority of the best and most venerated writers on sacred subjects (including Jeremy Taylor), that they are not binding on Christians, any more than the other marriage laws or customs of the Jews, which

(according to Grotius) allowed polygamy. But there is no necessity for disputing the authority of these precepts, since they impliedly sanction the very marriage in dispute.

The whole question turns on the eighteenth verse:

"Neither shalt thou take a wife to her sister, to vex her, to uncover her nakedness, beside the other *in her life time.*"—Leviticus, chap. xviii. ver. 18.

Upon this, Dr. Dodd's commentary is:

"Custom and practice are the best interpreters of law; and it appearing from these that polygamy was allowed amongst the Jews, as well as from Deut. xxi. 15, &c. xvii. 17, it is plain that the marginal interpretation (viz. one *wife to another*) cannot be true, *but that the marriage of two sisters at the same time is here prohibited;* and Grotius justly observes, that as the feuds and animosities of brothers are, of all others, the most keen; so are, generally, the jealousies and emulations between sisters. Therefore, the historian used the strong expression *to vex her:* but though a man might not marry two sisters *together,* it seems a natural conclusion, from the phrase *in her lifetime,* that he *might* marry the sister of his *deceased* wife: and thus, we learn from Selden, the Jews in general understood it."

Adam Clarke says:

"Thou shalt not marry two sisters at the same time, as Jacob did Rachael and Lea; but there is nothing in this law that rendered it illegal to marry a sister-in-law, when her sister was dead; therefore the text says, thou

shalt not take her in her lifetime to vex her, alluding probably to the case of the jealousies and vexations which subsisted between Lea and Rachael, and by which the family peace was so often disturbed."

The Septuagint, Vulgate, Syriac, Samaritan, Arabic and Chaldee paraphrases agree in this interpretation, which is adopted by Grotius, Montesquieu, Mr. Justice Story, and Chief Justice Vaughan. The last says:

"Within the meaning of Leviticus, and the constant practice of the commonwealth of the Jews, a man was prohibited not to marry his wife's sister only during her life, after he might; so the text is (citing it). This perhaps is a knot not easily untied, how the Levitical degrees are God's law in this kingdom, but not as they were in the commonwealth of Israel, where first given."

This is the only manner in which the precept can be reconciled with the precept in Deuteronomy (xxv. v. 5), where a marriage in the same degree of kindred is injoined as a duty:

"If brethren dwell together, and one of them die, and have no child, the wife of the dead shall not marry without unto a stranger: her husband's brother shall go in unto her, and take her to him to wife, and perform the duty of an husband's brother unto her."

The Archbishop of Dublin pointedly observes:—"As for the allegations from the Levitical law, if any one brings them forward *in sincerity*, he should be prepared to advocate adherence to it in all points alike; among others,

the compulsory marriage of a brother with his deceased brother's widow."

The Apostles are silent on the point, but reference has been made to the practice and doctrine of the early Christians. Now, admitting that their inclination was to condemn such marriages, their inclination was certainly much stronger to prevent clergymen from marrying at all. They also considered any second marriage, or marriage with a widow, as communicating a taint. It is impossible, therefore, to adopt their practice or doctrine, without distinguishing what is reconcilable with the existing constitution of society from what is not; and the moment we come to distinguish, the force of the authority (as such) is at an end.

With regard to the individual opinions of the Fathers (who are far from unanimous), these must be viewed in connection with the ascetic nature of their lives, which led them to consider even connubial intercourse as inconsistent with perfect purity. Every fresh restriction on marriage was regarded as a gain to Christianity. It was by adroitly availing themselves of this feeling that the Popes contrived to enlarge the list of prohibited degrees to the extent mentioned by Lord Coke; who instances a case in which a marriage was declared null, and the children bastardized, on the ground of the hus-

band's having stood godfather to the wife's cousin.

It seems to me therefore that the religious objection totally fails; and the legislature treated it as unfounded in 1835, when all marriages solemnized prior to the passing of Lord Lyndhurst's Act were deemed fit subjects of civil policy and virtually made good. It is also to be observed, that the Archbishop of Dublin and the Bishop of Llandaff (clara et venerabilia nomina) are among the supporters of the Bill for the alteration of the law; that six hundred of the clergy have petitioned in favour of it; and that it has been introduced into the House of Lords by Lord Wharncliffe, and into the House of Commons by Lord Francis Egerton; names which have already gone far towards silencing those who hoped to crush its supporters at the outset by the cry of irreligion and immorality.

But although it seems clear that a marriage with the sister of a deceased wife is nowhere prohibited in Scripture, the law will be found on inquiry to be based principally on the assumption that it is so prohibited. To show this, little more is necessary than to explain the manner in which the prohibition has obtained the sanction of the courts.

Prior to the Reformation, the degrees within which persons might marry were prescribed by the canon law; and the restrictions were

made as numerous as possible that the Romish church might extort a revenue by dispensing with them. At this period, a marriage with the sister of a deceased wife stood on the same footing as a marriage with a sixth or seventh cousin. Both were formally prohibited, and both actually took place. The cause of the change is well known. Henry the Eighth had married his brother's wife under a dispensation. He got tired of her, and applied to the Pope for a divorce on the ground of consanguinity, with the view of marrying Anne Boleyn.* The Pope refused, or granted it too late; the Reformation commenced, and Henry applied to one of his servile parliaments to release him from his ties. By 25 H. 8, c. 22, s. 3, a marriage with a brother's wife or a wife's sister is expressly declared to be within the prohibited degrees, all marriages between persons more remotely connected being legalized. This statute, however, is commonly regarded as superseded by the 32 Hen. 8, c. 38, which enacts in general terms, without any enumeration of degrees, "that all lawful persons may marry;" that "all persons shall be considered lawful that be not prohibited by

* "It seems, the marriage with his brother's wife
Has crept too near his conscience.
Suffolk.—No, his conscience
Has crept too near another lady."
Henry 8th, Act 2.

God's law;" and that "no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees." This act (though its meaning is far from clear) has been termed the Magna Charta of Matrimony, and was intended as a definitive settlement of the law; but there is a subsequent statute (1 Mary, sess. 2, c. 1,) by which Henry's marriage with Catherine is solemnly pronounced to have been from the beginning "a just, true, and holy union, in strict accordance with God's law and his holy word."*

It is obvious that these legislative declarations did not originate in moral or religious motives. They were political measures, having for their main objects the gratification of the sovereign's wishes and the settlement of the succession to the crown. In Mary's reign, it became necessary to sanction all marriages in the same degree of affinity as that of her mother, Catherine of Arragon. In Elizabeth's, it was thought necessary to discredit them in order to set up the marriage with Anne Boleyn; and the twist then given to opinion lasted for more than half a century--in fact, so long as the Protestant succession was at stake.

The table hung up in churches was prepared

* See an elaborate commentary on all the Acts, Vaughan's Rep. 323. They are very numerous, and it is extremely difficult to distinguish what is repealed from what is not.

by Archbishop Parker in his ecclesiastical capacity in 1563 (only five years after the Protestant Queen's accession), and has received no subsequent confirmation beyond what it may be supposed to derive from the canons of 1603, which are clearly not binding on the laity. Lord Hardwicke held distinctly that they possessed no binding authority as laws,* and Mr. Hallam says of them: "a code of new canons had recently been established in convocation, with the king's assent, obligatory perhaps upon the clergy, but tending to set up an unwarrantable authority over the whole nation."

Now, the leading case in which the temporal courts have declared a marriage with a deceased wife's sister to be void, is Hill v. Good,† decided by the Common Pleas in 1673. Lord Chief Justice Vaughan delivered the judgment of the court, and that judgment will be found to depend almost exclusively upon the assumed authority of these very canons. But in The Queen v. O'Connell, it was held (particularly by Lord Denman,) that almost any course of practice, or current of authorities, might be disregarded, if proved to have originated in mistake. It is quite clear that the doctrine in dispute originated in a mistake,—whether in the erro-

* *Middleton* v. *Croft*, 2 Atkin's Rep. App.

† Vaugh. Rep.

neous interpretation put upon a text of scripture or in the undue authority attributed to a set of canons, matters little,—at all events, in a mistake. If, therefore, it chanced to be brought under the consideration of Lord Denman and his brother judges, there is no saying to what conclusion they might come, and a good deal of embarrassing discussion would be inevitable. Let any pious person consider the consequences of discussing the authority and meaning of scriptural texts, on such a subject as marriage, before a court of common law.

The uncertain state of the law, therefore, forms in itself a strong argument for a declaratory Act. The state of the law in foreign countries is also most important; as proving both the sense put upon the alleged scriptural authority by other Christian communities, and the almost universal tendency to contract the marriages in question.

A man may marry the sister of a deceased wife, either as a matter of course or upon a formal application to the authorities, throughout the whole of Prussia (including the Rhenish provinces), Saxony, Hanover, Baden, Mecklenburgh, Hamburgh, Denmark, and most of the other Protestant States of Europe.

An unanswerable testimony regarding the frequency and beneficial results of such mar-

riages in the United States, has been given by Mr. Justice Story, the best possible authority: "Nothing is more common in almost all the states of America than second marriages of this sort; and so far from being doubtful as to their moral tendency, they are among us deemed the very best sort of marriages. In my whole life I never heard the slightest suggestion against them founded on moral or domestic considerations."*

In most Catholic countries they are formally prohibited, but dispensations are easily obtained, and no real difficulty is thrown in the way of persons desirous of contracting them. In France, they are of constant occurrence. The licence is granted by the Minister of Justice, who merely requires to be assured that no improper intercourse has taken place between the parties.

So far, therefore, everything is against the restrictive law or doctrine; and powerful indeed should be the reasons for maintaining it. But the only objection that still influences candid minds, is one that falls to the ground the moment we subject it to analysis.

* Letter to Mr. Edwin Field, read by Lord Wharncliffe in the course of his speech. Testimony equally strong and to the same effect regarding other countries, particularly France and Germany, has been supplied to me; but I do not feel at liberty to quote the names of my correspondents.

The proposed change, it is said, would alter the domestic relations, and diminish the comforts, of the parties principally concerned. The husband would no longer be regarded as a safe *chaperon* (this is the favourite word) for his sister-in-law; and no sister-in-law could live with a widower without reproach, unless she became his wife.

The fear of such a consequence (admitting it to be at all probable) would be an insufficient reason for refusing to legislate in the present instance, unless the lower class is to be entirely laid out of the question. The poor know nothing of *chaperons:* they are obliged to get who they can to take care of their families; and *their* domestic arrangements could not be disadvantageously affected by the change. But it is unnecessary to press this topic, because the objection proceeds altogether upon a mistake.

There are only two principles upon which the kind of intimacy in question between persons of different sexes, is sanctioned by the habits of society.

1. On the ground that sexual passion is completely excluded.

2. From reliance on age and character, or from a belief that men will not inflict a gross wrong on those dear to them, or be guilty of crime

under circumstances which would call down a more than ordinary degree of reprobation on their heads. Thus, elderly clergymen, first cousins,* and still more distant connections, enjoy considerable immunities; and close observers will admit that fair allowances are made for cases of peculiar position or necessity. A very slight degree of relationship would be thought to justify a steady woman of straitened means in accepting the hospitality of a widower with children.

There is no prohibition to marry affecting any of the cases within the second principle, and the case in question obviously depends upon that. It cannot depend on the first principle, because every one knows that sensual passion is not excluded; and it would be strange if it were. There is neither blood-relationship nor early habit to exclude it: up to the period when the husband makes his selection, he necessarily regards all the sisters alike; and it is preposterous to expect that a complete revulsion in his moral being is to take place then.

At all events, there is one unanswerable proof that the social sanction, supposed to be

* It is remarkable that marriages between first cousins were formerly resisted on precisely similar grounds. See Jeremy Taylor's *Duct. Dub.* B. 2.

in danger, does not depend upon the legal prohibition. If it did, the rule would be co-extensive with the prohibition. Now, although brothers-and-sisters-in-law will occasionally be found living together in great intimacy, perfect innocence, and without reproach, still this permitted intimacy varies according to age, character, position, and a host of circumstances too minute to specify. By way of illustration, it is simply necessary to compare the case of a gay man in the prime of life living with a coquettish beauty, and that of a staid middle-aged widower living with a plain, dowdy, respectable old maid. Yet the legal prohibition exists in both cases.

Laws framed on the *sic volo, sic jubeo* principle, especially when relating to morals, have proved nugatory or mischievous in all ages. The Bishop of London, however, conceives that it is simply necessary for a legislature to issue its decrees:

"When the fact is once known, that it is impossible to contract a marriage with a certain person, say a wife's sister, why should there be any more difficulty in a man's shaping his inclinations, affections, wishes and thoughts in such a line, as to shut out from his contemplation all idea of marriage with that person, *any more than with his own sister by blood?* I see none."

Others see a great deal; or why have so many enlightened Christian communities, after

prohibiting such marriages, come round to the conviction, that it is best to sanction them? Why are they constantly taking place in England in defiance of the law? or why are so many persons desirous of contracting them? In the case of a sister by blood, the feeling has commenced in infancy, grown with our growth, and strengthened with our strength. In the case of a wife's sister, we receive no assistance from habit; on the contrary, the acquaintance may have commenced with the very inclination we are expected to suppress. The difference is so radical, that, if all the nations in the world were to co-operate for the purpose, they could not put the two cases on a par, they could not make men regard their wives' sisters as their own; and the strictest law made by a single state, in opposition to the general feeling, would have no moral influence at all.

In Curran's celebrated speech against the late Marquis of Headfort, he supposes a warning voice thus addressing the noble defendant prior to the completion of the crime: "Pause, my lord, while there is yet a moment for reflection. What are your motives, what your views, what your prospects,—from what you are about to do? You are a married man, the husband of the most amiable and respectable of women; you cannot look to the chance of marrying this wretched

fugitive: between you and such an event there are *two sepulchres* to pass."

The barrier was practically as strong as any that can be constructed by the law, but it was not found strong enough to exclude the guilty wish.

The Bishop of London is the most formidable opponent of the bill, and I hope therefore I shall not be accused of presumption if I venture to scrutinize another passage of his speech:

"Now, my Lords, with regard to the question of expediency. I look at the state of society in this country, and I see reason to think, that the prohibition which prevents the intermarriage of persons within certain near degrees of affinity, is the very safe-guard of our domestic relations. Whatever advantages, my Lords, might result from its removal, in my opinion, they would be more than counterbalanced by the evils that would flow from that measure. There are cases, my Lords, I admit, where a widower is desirous of marrying the sister of his deceased wife, because he thinks that he has thereby a fairer chance of obtaining for his orphan children a kind mother, and a faithful protectress, than if he were to introduce under his roof a strange stepmother; but there are many more cases, *in the proportion of fifty to one*, where the husband would be desirous of having the benefit of the same maternal care over his orphan children shown them by the sister of his deceased wife, without any intention of marrying her; where perhaps his affections so linger about the grave of his deceased partner as shut out altogether from his

mind thoughts of future marriage; where he would be grateful to have bestowed on his children the tender care of his deceased wife's sister, an advantage from which they would be utterly precluded, if it was known that it was possible for him to marry that sister. For, my Lords, the state of society in this country is such, that it is held impossible for a man and a woman, not past a certain age, to live together with respectability and propriety without marriage, if they are persons not prevented by any legal impediment from contracting it. My Lords, I hold that this is a distinction between ourselves and some nations of the continent very much in our favour; and most sorry should I be to see the day when that distinction should be removed. My Lords, a deceased wife's sister may now with propriety undertake the care of her orphan nephews and nieces, because she can never stand to their father in any nearer relation. If the prohibitions were removed, it would be impossible for the husband to invite her to come and live under his roof, unless he held out an offer of marriage. The instances where the deceased wife's sister now fills that situation are so many, compared with those where the husband would be desirous of marrying her, that I think a great deal more will be lost on the one hand by permitting such marriages, than you could by possibility gain on the other."

The whole force of this argument rests on the assumption, that the widowed husband may *in all cases* receive the sister under his roof, and that the legal impediment is the cause. But, the widowed husband may not in all cases re-

ceive the sister, and it will hardly be contended, that two persons of opposite sexes may live together simply because a legal impediment exists. To justify them in doing so, the impediment must be of such a nature as to exclude, not only all hope of marriage, but all tendency to sexual inclination; and this, in the case before us, the legal impediment has proved utterly unable to effect. The experiment has been fairly tried on the largest possible scale, and it has failed at all times and in all countries.

If, therefore, persons so related by affinity have (as the Bishop of London takes for granted) been in the habit of living together, in full reliance on the power of the legal impediment to exclude unholy wishes, and if (as the Bishop of London also takes for granted) it be, generally speaking, injurious to morality for persons of opposite sexes to live together without marrying, the sooner persons so related give up the habit, the better; for assuredly they are leaning on a reed. Those among them who are anxiously calling for the interposition of the legislature, have evidently become aware of their danger, for they say in effect, "We dare not live together, as the Bishop of London says we may." They may be mistaken, but they are at all events entitled to

respect and sympathy. Were they to adopt a different line of conduct, his Lordship might have a great deal to answer for.

His Lordship says, that the cases are as fifty to one, where the husband would wish to have the benefit of the sister-in-law's maternal care for his children without marrying her. If this be so, how happens it that so many (thousands, according to Lord Wharncliffe) have married, and so many are anxious to marry, their sisters-in-law? In point of fact, the assertion is most unjust to the male sex. Men are selfish enough in all conscience, but surely so large a proportion would not desire or encourage such a sacrifice; and few young women, supposing them willing, would be permitted by their parents to devote the best years of their life to such an object. Setting all considerations of morality apart, the only mode by which, in the majority of cases, a widower can permanently secure the maternal care of a marriageable sister-in-law for his children, is by marrying her. The value of this care is admitted on all hands, and it is therefore unnecessary to dwell upon it.*

To guard myself effectually against the charge of presumption, it may be as well to quote the

* See Montesquieu (Book xxvi. c. 14), where such marriages are strongly recommended.

Archbishop of Dublin's remark on this argument:

"The only objection which at the first glance appears to have any plausibility, would be perceived, I think, on a very little reflection, to be extremely feeble, namely, the supposed advantage (under the prohibition of such marriages) of a widower's being enabled without scandal to reside with his deceased wife's sister.

"In fact, nothing more effectually guards against any such scandal than its being known, that, if any one were so disposed, they were at liberty to marry.

"But as for any *abhorrence* of cohabitation between them, as *monstrous* and *unnatural*, being created by a law prohibiting their marriage, no idea can be more absurd. The law does not permit a woman to marry during her husband's lifetime; yet this does not obviate the scandal that would arise from the unrestrained familiar intercourse of a married woman with another man."

The worst of the apprehended evil then appears, on analysis, to be this—that, if the prohibition were removed, certain persons who (from age, habits, character, or conduct) might be expected to marry, but who are now living together without marrying, and had rather continue to do so, would be obliged to marry or to part. This is an evil of so doubtful a character, that it might be mistaken for a good.

Against it must be set—the spurious origin of the restrictive law: its doubtful authority: the

parliamentary pledge to reconsider it: its want of harmony with the laws of other countries, as well as with the habits and feelings of society in our own: the consequent impossibility of enforcing it: its demoralizing effect on the lower class: the litigation it must entail on the higher: and the misery it is hourly occasioning to thousands of almost every rank in life.

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